Supreme Court, U.S.
FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-2057

EVANNA POWELL,
Petitioner

versus

ANTHONY NIGRO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Evanna Powell
Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

INDEX

	Page
Citations	iii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes & Regulations Involved	3
Statement of the Case	6
Basis for Federal Jurisdiction in the United States District Court	8
Reasons for Granting the Writ	8
Argument	10
Conclusion	18
Affidavit of Service	19
Appendix A-1	A-1
Appendix A-2 Orders of the United States Court of Appeals for the District of Columbia Circuit	A-2
Appendix B-1	A-3
B-2 Orders of the United States District Court for the District of Columbia Circuit	A-4

Page

Appendix C — A-5
"Freedom of Information Act"
5 U.S.C. 552

Appendix D — A-9
Local Rules of the United States District Court for the District of Columbia Circuit (L.R. 1-9(d) & (h))

Appendix E — A-10
Federal Rules of Civil Procedure 7(a) Pleadings Allowed

CITATIONS

	Page
CASES:	
California Motor Transport Co. v. Trucking Unlimited, 92 S.Ct. 609, 404 U.S. 508(1972)	15
Cruz v. Beto, 92 S.Ct. 1079, 405 U.S. 319, appeal after remand 497 F.2d. 496(1972)	15
Davis v. Murphy, 559 F.2d 1098 (1977)	15
Miree v. DeKalb County, Georgia, 97 S.Ct. 2490, on remand 565 F.2d 1324(1977)	15
National Life Insurance Co. v. Silverman, 454 F.2d 899, 147 U.S. App. D.C. 56(1971)	17
Scheuer v. Rhodes, 94 S.Ct. 1683, 416 U.S. 232(1974)	15
United States v. General Motors Corp., 518 F.2d 441, 171 U.S.App. D.C. 48(1975)	16
STATUTES:	
D.C. Code §1-717 (Supp v. 1978)	4,11
Fed.R.Civ.P. 7(a)	14
Fed.R.Civ.P. 56(e)	3,4,7,16
Fed.R.Civ.P. 56(f)	3,4,7 16,17

	Page
Fed.R.Civ.P. 58	4,9,17
U.S.CONST. art. III, §2, cl.2	2
U.S.CONST. amend. V	4,10
U.S.CONST. amend. XIV	4
5 U.S.C. 552	2,10
5 U.S.C. 552(a)(1)	3
5 U.S.C. 552(a)(2)	3,11
5 U.S.C. 552(a)(4)(B)	3,8
5 U.S.C. 552(a)(4)(C)	2,3,12,13,14
5 U.S.C. 552(a)(6)(A)(i)	3,6,12
5 U.S.C. 551	5,11
5 U.S.C. 1002	14
28 U.S.C. 1254(1)	2

LEGISLATIVE HISTORY OF THE "FREEDOM OF INFORMATION ACT"

	Page
"Agency Definition," Conf. Rep. No. 1200, 93rd Cong., 2nd Sess. (1974), U.S.Code Cong. & Ad. News, 6293	5,11
"Pleading," Conf. Rep. No. 1200, 93rd Cong., 2nd Sess. (1974), U.S.Code Cong. & Ad. News, 6288	5,13

LOCAL RULES OF THE U.S. DISTRICT COURT	Page
L.R. 1-9(d)	3,7,16
L.R. 1-9(h)	3,7,16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

EVANNA POWELL,
Petitioner

versus

ANTHONY NIGRO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decisions of the United States Court of Appeals for the District of Columbia Circuit rendered April 2, 1980 and May 20, 1980.

OPINIONS BELOW

In this case of first impression, neither the United States Court of Appeals for the District of Columbia Circuit nor the United States District Court for the District of Columbia delivered any official or unofficial reports of opinions. The Orders of the United States Court of Appeals for the District of Columbia Circuit and the Orders of the United States District Court for the District of Columbia are reproduced hereinafter in

Appendix A and Appendix B, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and U.S. CONST. art. III, § 2, cl. 2.

QUESTIONS PRESENTED

I. Whether the respondent complied with the federal "Freedom of Information Act," 5 U.S.C. 552, when he did not allow the petitioner to inspect and copy agency records, or did not notify the petitioner of his determination with reasons therefor within 10 days of the petitioner's two (2) requests.

II. Whether, by filing a motion in response to the petitioner's complaint, the respondent complied with section 552(a)(4)(C) and the legislative history relating thereto, which govern pleadings under the "Freedom of Information Act," and which require "an answer or other responsive pleading," not a motion.

III. Whether the respondent's Motion to Dismiss for failure to state a claim upon which relief can be granted, should have been granted when United States Supreme Court cases hold that allegations in a complaint, to which said Motion is made, must be taken as true, and that the complaint must be construed in the light most favorable to the plaintiff(petitioner).

IV. Whether the respondent's Motion to Dismiss should have been granted before

the petitioner could be heard on said Motion or her Motion for Summary Judgment which Opposition and Motion were timely filed after 12:00 noon on the day before the Order dismissing the action was entered.

V. Whether the petitioner was entitled to relief as a matter of law in this case where the respondent did not file either the opposing statement required by Fed.R.Civ.P. 56(e) and Local Rule 1-9(d) and (h) (Local Rules of the trial court), or a Fed.R.Civ.P. 56(f) statement indicating the reasons why he should not file an opposing statement.

VI. Whether the court should have entered judgment, on a separate document, for the petitioner's Motion for Summary Judgment, or at least, should have referred to said Motion in the Order relating to the Motion to Dismiss when the Motion for Summary Judgment was timely filed after 12:00 noon on the day before said Order was entered.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The federal "Freedom of Information Act," 5 U.S.C. 552; section 552(a)(1); section 552(a)(2); section 552(a)(4)(B); section 552(a)(4)(C); section 552(a)(6)(A)(i); and section 552(e) (Cum. Supp. U.S.C. Service FCA, May, 1979, pp. 200-, 203)(Appendix C)

Local Rules of the United States District Court 1-9(d) and 1-9(h)(July, 1979, pp. 7

and 8)(Appendix D).

U.S. CONST. amend. V. states, "No person shall be ... deprived of life, liberty, or property, without due process of law....

U.S. CONST. amend. XIV states, "No State shall ... deprive any person of life, liberty, or property, without due process of law ....

D.C. Code §1-717 (Supp. v 1978) states, "The District of Columbia shall remain and continue to be a government corporation."

Fed.R.Civ.P. 56(e)(1978 Edition, p. 83) states, "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added)

Fed.R.Civ.P. 56(f)(1978 Edition, p. 83) states, "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit, facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed.R.Civ.P. 58(1978 Edition, p. 84)

states, "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." (emphasis added)

5 U.S.C. 551 states, "For the purpose of this subchapter [Administrative Procedure--(1)"agency" ... does not include--(B) the courts of the United States; and (C) the government of the District of Columbia."

The legislative history of the definition of "agency" within the context of the "Freedom of Information Act" states, "The House bill extends the applicability of the Freedom of Information law to include any ... Government corporation, Government-controlled corporation...

The Senate amendment provided that for purposes of the Freedom of Information law the term agency included any agency defined in section 551(1) of title 5, United States Code....

The conference substitute follows the House bill. The conferees state that they intend to include within the definition of "agency" those entities encompassed by 5 U.S.C. 551... and government corporations or government-controlled corporations now in existence....(emphasis added)(U.S.Code Cong. & Ad. News, Vol. 2, 1974 p. 6293)

The legislative history of the type of response to complaints in a "Freedom of Information Act" case states,"The House bill required that the defendant to a complaint under the Freedom of Information

law serve a responsive pleading within 20 days after service, unless the court directed otherwise for good cause shown.

The Senate amendment contained a similar provision, except that it would give the defendant 40 days to file an answer.

The Conference substitute would give the defendant 30 days to respond, unless the court directs otherwise for good cause shown.(emphasis added) U.S. Code Cong. & Ad. News, Vol. 2, 1974, p. 6288)

STATEMENT OF THE CASE

On October 22, 1979 and November 19, 1979, the petitioner requested the respondent who is secretary to the Committee on Admissions of the District of Columbia Bar and who is an employee of an agency subject to the federal "Freedom of Information" that she be allowed to inspect and copy designated records of the Committee on Admissions.

The respondent neither granted or denied the petitioner's requests nor notified the petitioner of his determination with reasons therefor within 10 days as section 552(a)(6)(A)(i) requires or notified her at any time of his determination.

Due to a lack of action by the respondent, the petitioner filed, pursuant to section 552(a)(5)(B), a Complaint for Declaratory, Injunctive and Other Relief. In response to the Complaint, the respondent filed a Motion to Dismiss for failure to state a claim upon which relief can be

granted.

On January 3, 1980, after noon, the petitioner filed a Memorandum in Opposition to the Motion to Dismiss and at the same time filed a Motion for Summary Judgment.

On January 4, 1980, the United States District Court for the District of Columbia Circuit entered the Order granting the Motion to Dismiss, but without, referring therein, to the Motion for Summary Judgment or without entering judgment, for the Summary Judgment, on a separate document.

The Motion for Summary Judgment was timely filed before the Order was entered, but the respondent did not file an opposing statement as Fed.R.Civ.P. 56(e) and L.R. 1-9(d) and (h) require or file a statement indicating why he should not file an opposing statement as Fed.R.Civ.P. 56(f) requires.

Because of the proximity of the petitioner's filing her Memorandum in Opposition and Motion for Summary Judgment to the court's entering the Order dismissing the case, and due to the ramifications of such proximity, the petitioner filed a Motion to Alter Judgment which was denied.

Following denial of the latter motion, the petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit and therein filed a Motion for Summary Reversal and the respondent filed a Motion for Summary Affirmance.

On April 2, 1980, the Court of Appeals

granted the respondent's Motion but denied the petitioner's Motion without issuing an opinion or memorandum in this case of first impression in this instance where the "Handbook of Practice and Internal Procedures" of the Court of Appeals for the District of Columbia Circuit requires an opinion.

Following the Appeals Court action on the Reversal and Affirmance motions, the petitioner filed a Suggestion for a Rehearing En Banc which was denied by the court May 20, 1980.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The United States District Court had jurisdiction over this matter in the first instance based on 5 U.S.C. 552(a)(4)(B).

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit affirming the decision of the United States District Court, involves an interpretation of the applicability of the federal "Freedom of Information Act" to the respondent who is secretary to the Committee on Admissions to the District of Columbia Bar, which applicability has never been decided by the Supreme Court of the United States (or the Court of Appeals or District Court for the District of Columbia Circuit) but should be settled by it.

The decision of the Court of Appeals

affirming the decision of the District Court is in direct conflict with the letter and legislative intent of the federal "Freedom of Information Act."

The decision of the Court of Appeals affirming the decision of the District Court which decision concerned granting the Motion to Dismiss, but not taking the allegations in the petitioner's Complaint as true and did not construe the Complaint in the light most favorable to the petitioner, is in direct conflict with cases, on this point, previously decided by the Supreme Court.

The decision of the Court of Appeals affirming the District Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision because the lack of action regarding the Motion for Summary Judgment and the failure to grant said Motion are in direct conflict with cases previously decided by this Court of Appeals; because the respondent did not file an opposing statement like the Federal and local rules require; because a separate judgment, for the Motion for Summary Judgment, was not entered as Fed.R.Civ.P. 58 requires nor was there any reference to said Motion in the Order that was entered after said Motion was filed.

The decision of the Court of Appeals not to publish an opinion is contrary to the "Handbook of Practice and Internal Procedures," United States Court of Appeals for the District of Columbia Circuit, March,

1978, p. 67, which states, " It is the policy of the Court to publish an opinion under the following circumstances, inter alia, When a decision establishes a new rule of law ...; when it involves a legal issue of unusual or continuing public interest; ... when it wishes to ... clarify, or otherwise contribute to an understanding of existing law; or when the decision involves a novel fact situation. (emphasis added)

It is the policy of the Court not to publish an opinion when the case involves routine application of established law to a particular set of facts."

Since this case involves a novel fact situation dealing with a legal issue of unusual and continuing public interest which establishes a new rule of law, the writ should issue.

The decision of the Court of Appeals affirming the District Court Order granting the Motion to Dismiss before the petitioner was heard on said Motion or heard on her Motion for Summary Judgment, denied the petitioner due process of law guaranteed by the Fifth Amendment of the United States Constition.

ARGUMENT

This is a case of first impression involving the applicability of the federal "Freedom of Information Act," 5 U.S.C. 552, to the respondent who is secretary to the Committee on Admissions to the District of Columbia Bar.

Section 552(a)(2) gives the petitioner the right to inspect and copy the records of the respondent who is an employee of an agency, as "agency" is defined in the legislative history of said Act, to wit,

> The House bill extends the applicability of the Freedom of Information law to include any ... Government corporation, Government-controlled corporation,....
>
> The conference substitute follows the House bill. The conferees state that they intend to include within the definition of "agency" those entities encompassed by 5 U.S.C. 551 ... and government corporations or government-controlled corporations now in existence ....(emphasis added). Conf. Rep. No. 1200, 93rd Cong., 2nd Sess. (1974), U.S. Code Cong. & Ad. News, 6293

The relevant entities encompassed by section 551 and presently subject to section 552 as a result of broadening the definition of agency are, the government of the District of Columbia,(section 551(D)) and the court that employs the respondent which court was created by and is controlled by the federal government, (section 551(B)).

D.C. Code §1-717 (Supp. v 1978) states "The District of Columbia shall remain and continue to be a government corporation."

As an employee of a Government corporation as well as a Government-controlled corporation (government with the lower case "g" as well), as an employee of the government

of the District of Columbia, and as an employee of a court created and controlled by the federal government, the respondent is an employee of an agency within the legislative history definition of said term, and consequently, the respondent is subject to the federal "Freedom of Information Act."

Since the respondent is subject to the federal "Freedom of Information Act," he was required to comply with section 552(a)(6)(A)(i) which states,

> Each agency shall, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall, determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor.... (Cum. Supp. U.S.C. Service FCA, May, 1979, p. 201)

The respondent did not make a determination within 10 days after receipt of either of the petitioner's two requests, nor did he notify the petitioner, at any time, of his determination with or without reasons. Therefore, the respondent failed to comply with section 552(a)(6)(A)(i).

Section 552(a)(4)(C) states,

> Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint under this subsection within

30 days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

In response to the petitioner's complaint filed pursuant to this Act, the respondent filed a motion (to dismiss) which was clearly improper, not only because of section 552(a)(4)(C), but also because of the legislative history which explicitly states the requirements, and thereby, resolves any ambiguities regarding the legal document required. The legislative history is as follows:

> The House bill required that the defendant to a complaint under the Freedom of Information law serve a responsive pleading within 20 days after service, unless the court directed otherwise for good cause shown.
>
> The Senate amendment contained a similar provision, except that it would give the defendant 40 days to file an answer.
>
> The conference substitute would give the defendant 30 days to respond, unless the court directs otherwise for good cause shown. (emphasis added) Conf. Rep. No. 1200, 93rd Cong., 2nd Sess. (1974) U.S. Code Cong. & Ad. News, 6288

To understand and fully appreciate the reasons why Congress enacted the "Freedom of Information Act" with a provision specifically requiring, in response to a

complaint under said Act, an answer or other pleading only, one should know that the "Freedom of Information Act" amended section 3, the Public Information section of the "Administrative Procedure Act" of 1946, 5 U.S.C. 1002, which latter Act contains a provision for public access to government information, but which section 3 was not complied with. Hence, non-compliance and abuse resulted in excessive, improper denial of access to government records.

To correct the abuses in denying access, Congress enacted section 552(a)(4)(C) requiring an answer or responsive pleading because by use of these pleadings, the court can determine, by the admission or denial of each and every averment, whether denial was proper.

In this case for instance, nowhere in the defendant's motions or other legal papers filed, did he indicate whether he granted or denied the petitioner's requests, or whether he notified the petitioner of his determination with reasons therefor within 10 days after each request.

Because the respondent did not file an answer or other responsive pleading (as pleading is defined in Fed.R.Civ.P. 7(a)) (Appendix B) and therein admit or deny each and every allegation in the complaint, the court nor petitioner cannot determine whether the respondent's action was proper or improper.

The respondent's Motion (to dismiss) filed in response to the Complaint states

the petitioner failed to state a claim upon which relief can be granted. The respondent's response does not address the questions of whether he granted or denied the petitioner's requests, or whether he notified the petitioner of his determination with reasons therefor within 10 days after receipt of the requests.

However, in view of the fact that section 552 gives the petitioner the right to inspect and copy the respondent's records, the petitioner made 2 requests pursuant to said section, the respondent failed to give notice of his determination, and the United States District Court has jurisdiction to enjoin withholding, the petitioner contends she stated a claim upon which relief could have been granted, and therefore granting the Motion was improper.

On a motion to dismiss for failure to state a claim, the district court must construe the complaint in the light most favorable to the plaintiff, and must take the allegations contained therein, as true. California Motor Transport Co. v. Trucking Unlimited, 92 S.Ct. 609, 404 U.S. 508 (1972); Scheuer v. Rhodes, 94 S.Ct. 1683, 416 U.S. 232(1974); Miree v. DeKalb County, Georgia, 97 S.Ct. 2490, on remand 565 F.2d 1324(1977); Cruz v. Beto, 92 S.Ct. 1079, 405 U.S. 319, appeal after remand 497 F.2d. 496(1972)

Also in support of the impropriety of dismissing the complaint is Davis v. Murphy, 559 F.2d 1098(1977), which states that dismissal is improper where the plaintiff's proof supports a prima facie case which

case the petitioner contends she has made.

Fed.R.Civ.P. 56(e) and L.R. 1-9(d) and (h) require the party opposing a motion for summary judgment, to set forth, in an opposing statement, all material facts as to which it is contended there exists a genuine issue in dispute.

Fed.R.Civ.P. 56(f) states that if the party opposing the motion for summary judgment does not file an opposing statement, he should file a statement justifying his failure to file an opposing statement.

The petitioner timely filed a Motion for Summary Judgment on January 3, 1980, stating there was no genuine issue as to any material facts, and that she was entitled to judgment as a matter of law.

The facts to which there is no dispute are that the federal "Freedom of Information Act" gives the petitioner the right to inspect and copy the respondent's records, that the petitioner made two requests pursuant to said Act, that the respondent failed to grant the requests or otherwise give notice of his determination, and that the District Court had jurisdiction to enjoin withholding the records.

The United States Court of Appeals for the District of Columbia held in United States v. General Motors Corp., 518 F.2d 441, 171 U.S. App.D.C. 48(1975), that a motion for summary judgment will generally be granted unless the opposing party offers evidence demonstrating "a defense fairly arguable and of substantial character, " or unless he presents good reasons, in accor-

dance with rule 56(f), for failure to offer "facts essential to justify his opposition" to the motion.

But, in this case, the respondent did not file an opposing statement or a rule 56(f) statement, yet, the court did not grant the petitioner's Motion for Summary Judgment.

Fed.R.Civ.P. 58 states, "Every judgment shall be set forth on a separate document."

National Life Insurance Co. v. Silverman, 454 F.2d 899, 147 U.S.App. D.C. 56(1971), a case decided by the same court that ruled on my Motion for Summary Judgment, held that the material facts without substantial controversy should be specified in the Court's order on a motion for summary judgment.

However, under the present fact situation the court did not 1.) enter an order on the petitioner's Motion for Summary Judgment, and 2.) because it did not enter the order, it did not specify the material facts which were without controversy, hence, neither complying with rule 58 or its own case which is a precedent in this case.

In addition to affirming the decisions of the lower court which decisions are in conflict with previously decided cases and existing statutes, the United States Court of Appeals did not deliver an opinion in this case which falls within several categories wherein opinions are written, some of which categories are on page 10.

CONCLUSION

The respondent is an employee of an agency subject to the federal "Freedom of Information Act," and as such, he was required to comply with said Act, but he did not comply.

Furthermore, the respondent did not comply with specific federal and local rules of procedure to which compliance was crucial in determining whether the petitioner should have prevailed.

The action of the United States Court of Appeals in affirming the decision of the United States District Court which District Court decision is in direct conflict with cases decided by the Supreme Court of the United States, as well as, the United States Court of Appeals for the District of Columbia Circuit; and which decision of said Court of Appeals, not to write an opinion in this case which falls within several categories wherein said Court of Appeals ordinarily writes opinions, is contrary to said Court's policy.

For the foregoing reasons which are explained in detail in the Argument, it is respectfully requested that a writ of certiorari be granted to review and reverse the decisions of the United States Court of Appeals for the District of Columbia Circuit.

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

AFFIDAVIT OF SERVICE

CITY OF: Washington

STATE OF: District of Columbia

I, Evanna Powell, being first duly sworn, state that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, with prepaid postage, this , day of , 1980, to

Leo N. Gorman, Asst. Corp. Counsel, D.C.
Attorney for the Defendant
District Building
1350 "E" Street, N.W.
Washington, D.C. 20004

Evanna Powell
5749 5th St., N.E.
Washington, D.C. 20011
529-2773

Subscribed and sworn to before me this _____ day of , 1980.

Notary Public

APPENDIX A-1
Order of the United States Court of Appeals
for the District of Columbia

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1147

September Term, 1979
Civil Action
No. 79-3208

Evanna Powell,
Appellant

Filed: Apr 2 1980

v.

Anthony Nigro

Before: Wright, Chief Judge, Tamm & Edwards,
Circuit Judges

ORDER

On consideration of appellant's motion for summary reversal, appellee's motion for summary affirmance, the oppositions thereto and of appellant's reply, it is

ORDERED by the Court that the motion for summary reversal is denied, and, it is

FURTHER ORDERED by the Court that appellee's motion is granted and the order of the District Court on appeal herein is summarily affirmed.

Per Curiam

(Appellant's copy was not signed but the copy had an original date stamp affixed)
Chief Judge Wright did not participate in the foregoing order.

APPENDIX A-2
Order of the United States Court of Appeals for the District of Columbia

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1147

September Term, 1979
Civil Action
No. 79-3208

Evanna Powell,
Appellant

Filed: May 20 1980

v.

Anthony Nigro

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva and Edwards, Circuit Judges

ORDER

Appellant's suggestion for rehearing en banc, filed April 16, 1980, has been received and transmitted to the full Court. No judge of the Court in regular active service has requested that a vote be taken thereon and it is therefor

ORDERED by the Court, en banc, that the suggestion for rehearing en banc is denied.

Per Curiam
For The Court

/s/Robert A. Bonner
Chief Deputy Clerk

APPENDIX B-1
Order of the United States District Court
for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMNIA

FILED: January 4, 1980

EVANNA POWELL
Plaintiff

Civil Action
No. 79-3208

v.

ANTHONY NIGRO
Defendant

ORDER

Upon consideration of defendant's motion to dismiss the complaint, memorandum of points and authorities in support thereof, and it appearing that the complaint fails to state a claim upon which relief may be granted, it is, this 4th day of January, 1980,

ORDERED, That defendant's motion be, and the same is, hereby granted; and it is

FURTHER ORDERED: That the complaint be, and the same is, hereby dismissed, with prejudice.

/s/Aubrey Robinson,Jr.
JUDGE

APPENDIX B-2
Order of the United States District Court
for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED: JANUARY 25, 1980

EVANNA POWELL
Plaintiff

v.

ANTHONY NIGRO
Defendant

ORDER

Upon consideration of Plaintiff's Motion to Alter Judgment, the Memorandum in support thereof, and the entire record herein, it is by the Court this 25th day of January 1980,

ORDERED, that Plaintiff's Motion to Alter Judgment be, and hereby is, DENIED.

/s/ Aubrey Robinson, Jr.
United States District
Judge

APPENDIX C

"Freedom of Information Act"
5 U.S.C. 552

552. - Agency rules, opinions, orders, records, and proceedings.-(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not be published.

For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register and

(C) administrative staff manuals and instructions to staff that affect a member of the public unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published....A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this Section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court con-

siders of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination....

552(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title [5USCS §551(1)] includes any executive department, military department, Goverment corporation, Government controlled corporation, or other establishment in the executive branch of the Government.... (emphasis added)(Cum. Supp. U.S.C. Service FCA, May, 1979, pp. 200 - 203.)

APPENDIX D
Local Rules of the United States District Court

L.R. 1-9(d)

OPPOSING POINTS AND AUTHORITIES

Within ten days of the date of service or such other time as the court may direct, an opposing party shall serve and file a statement of points and authorities in opposition to the motion, together with a proposed order. If such opposing statement is not filed within the prescribed time, the court may treat the motion as conceded. (emphasis added)

L.R. 1-9(h)

MOTIONS FOR SUMMARY JUDGMENT

A party opposing such a motion shall serve and file, together with his opposing statement of points and authorities, a concise"statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, and shall include therein references to the parts of the record relied on to support such statement. In determining a motion for summary judgment, the court may assume that the facts as claimed by the moving party in his statement of material facts are admitted to exist except as and to the extent that such facts are controverted in a statement filed in opposition to the motion.(emphasis added)(July, 1979 Edition, pp. 7 & 8)

APPENDIX E
Pleadings Allowed, Federal Rules of Civil Procedure 7(a)

PLEADINGS ALLOWED

(a)Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.(emphasis added)(Federal Rules of Civil Procedure, 1978 Edition, p. 20)